FILE COPY
No. 327

Office - Supreme Court, U. S.
FILED
JAN 14 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM—1942

FRED FISHER MUSIC CO., INC. and
GEORGE GRAFF, JR.,

Petitioners,

against.

M. WITMARK & SONS,

Respondent.

PETITIONERS' REPLY BRIEF

ARTHUR GARFIELD HAYS,
Solicitor for Petitioners.

JOHN SCHULMAN,
of Counsel.

INDEX

Supreme Court of the United States

OCTOBER TERM—1942

FRED FISHER MUSIC CO., INC. and GEORGE GRAFF, JR.,

Petitioners,

against

M. WITMARK & SONS,

Respondent.

PETITIONERS' REPLY BRIEF

Throughout the respondent's brief, there runs the refrain that the statutory renewal privilege is no different from any other property and should therefore be equally alienable. Phrased in many ways, the argument resolves itself into a modification of that which was advanced by Mr. Drone in 1878—it is not reasonable to suppose that the object of the statute was to preserve to the author or his family any rights with which he has voluntarily parted (Drone on Copyright, 327).

We also find reverberations from a book written by Bowker in 1886 (Copyright, Its Law and Its History, Chapter XI, pp. 33, *et seq.*) which urged that the relationship between authors and publishers was not properly within the scope of a copyright code; that there should be no interference with freedom of contract between parties to a business transaction; and that the author might reserve the renewal for his own benefit or freely contract away the renewal as part of the original bargain.

We know, however, that the courts and the text writers have not followed Mr. Drone, at least in respect of the

right of the author to dispose of the renewal privilege enuring to his family." Congress adopted the Statute of 1909 and continued the renewal privilege limited to the author and his family after Drone and Bowker wrote.

In our main brief, we quoted from the later book written by Mr. Bowker in 1912 (Copyright, Its History and Its Law) where he was no longer so certain of his ground (Petitioners' main brief, pp. 51-52). In 1912, after Congress had stated what its intention was, Bowker wrote that a contract to transfer the copyright renewal period *might* be enforced by the courts. He also suggested that if an author sold his work outright, the renewal might be invalidated completely. Bowker was undoubtedly obliged to undergo a change in thought as a result of the new Copyright Law.

The respondent finds itself hard pressed to square the doctrine of free alienability with the limitations on the renewal privilege imposed by Congress. For instance, when counsel for the respondent is faced with the necessity of answering the statement in the Patent Committee's Report that "your Committee felt it should be the exclusive right of the author *to take* the renewal term", his only answer is (Brief 27) that the exclusivity referred to, is that which flows from the ownership of copyright. He does not explain the vital words "to take the renewal term."

Similarly, in an attempt to overcome the distinction in Section 23 between impersonal works which may be renewed by the proprietor, and personal works where the exclusive right of renewal vests in the author, the respondent argues (Brief 14) that it is unthinkable that a proprietor should not be able to sell the renewal right. Counsel suggests that Congress had no purpose in protecting a proprietor against an improvident act, and that since the two portions of Section 23 are parallel they

should be read alike. Respondent, however, fails to take into account that the two portions are not parallel. Proprietorship has reference to ownership of copyright. As ownership passes from person to person, proprietorship varies accordingly. Consequently, the statute in providing that the "proprietor" may take the renewal, refers to the person who owns the copyright at the crucial time. This interpretation was given to the Act in a preliminary decision in *Shapiro, Bernstein & Co. v. Bryan*, 27 Fed. Supp. 11, 13. Judge Coxe said:

> "I think the words 'proprietor of such copyright' in this connection plainly means the proprietor at the time of the renewal, and not at the time of the original copyright."

Mr. Howell, "The Copyright Law", page 102, likewise adopts this view.

Authorship, however, never changes. It bespeaks the relation of the creator of a work to the work itself. Proprietorship varies with ownership. Authorship, on the other hand, remains constant. This thought may be stated in another way. Authors who own or purchase their copyright are proprietors. A person who buys a copyright does not become the author. It follows, therefore, that the concept which underlies the proprietor's renewal of copyright, is totally different from that which restricts the privilege to the author.

Since the respondent adopts the premise that the statutory renewal privilege does not differ from other property, his conclusion that it may be alienated follows readily enough. It is the premise, therefore, which must be examined, and if that be fallacious, the entire structure must fall.

In examining that premise, we find that a number of questions are not answered by the respondent.

1. Why was the renewal created and why was it made contingent upon the author's life? The answer obviously is that the purpose was to benefit the author. The renewal privilege is a special kind of property existing only by force of the statute and available only in accordance with the legislative grant. If it had been intended that the publisher might acquire the renewal with the first term, there was no reason to deprive him of the monopoly for a second twenty-eight years because the author failed to outlive the original term.

2. The next inquiry is, why did the Statute of 1831 eliminate the assignee from the category of persons entitled to take the renewal? Judge Putnam, in *White-Smith Music Pub. Co.* v. *Goff*, 187 Fed. 247, 250, said it was to dissever the title and to create a new grant—a privilege available only to the persons named in the statute. Respondent replies (Brief 30) that Judge Putnam misinterpreted the statute, but provides no alternative reason, except to say that the exclusion made no difference (Brief 36).

3. All writers, and the decided cases, agree that the author may not confer upon the assignee the privilege of applying for the renewal in his own right. Respondent replies (Brief 15) that the author may "have someone act for him" and that this limitation has no bearing upon the beneficial ownership. This argument disregards reality. If the publisher owns the renewal and files it in the name of the author, is he acting for the author or is he acting for himself? Respondent provides no adequate answer to the question whether Congress was concerned only with the name in which the renewal was registered, or whether it was interested in the tangible advantages flowing from his special privilege.

4. Most writers agree that legal title to the renewal may not be assigned in advance, but some say that

contract to assign may be enforced in equity. Others say that a disposition of the ownership may destroy the renewal privilege entirely.

Since the legal "technicality" was imposed by statute, why was that impediment created and how may a court of equity disregard the legislative will? To this, respondent provides no answer. To assert that a legislative limitation is a mere technicality does not meet the issue.

5. When the Copyright Law was in the course of amendment in 1905 to 1909, the suggestion had been made—and the Committees of both houses originally adopted this suggestion—that there be a single term of copyright which would have been alienable in its entirety. This provision was later rejected and the renewal pattern retained for the author's benefit.

The most that respondent can say about this history is that the purpose was to make it "easy" for the author to keep the renewal term (Brief 25). This is hardly an answer. If the word "assigns" had been included in the statute, it would still have been "easy" for the author to omit the assignment from the contract. If a single term had been adopted, it would still have been easy for the author to grant only twenty-eight years of that term and to retain the balance for himself.

The difficulty which the Committees envisioned was not in the preparation of contracts, but one of a lack of business acumen and bargaining power. They stated that authors not infrequently sell their copyrights outright for comparatively small sums. This was not because proper contracts could not have been written, but because authors, either by reason of improvidence or driven by necessity, failed to provide for the future. We agree that Congress wanted to aid the author. The safeguard which it provided took the form of preventing an author from disposing of his special privilege until the twenty-eighth year of the original term.

It is respectfully submitted that the respondent has failed to meet the real issue in the case, namely, the purpose which was sought to be accomplished by the limitations written into Section 23 of the Copyright Law. This purpose was to safeguard the author against his own improvidence. That purpose can be effectuated only if contracts purporting to alienate the renewal in advance are held void and unenforceable.

Respectfully submitted,

ARTHUR GARFIELD HAYS,
Solicitor for Petitioners.

JOHN SCHULMAN,
of Counsel.